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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 477th MEETING

Held at Headquarters, New York,
on Monday, 11 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS

ELECTION OF OFFICERS (continued)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, Office of Conference Services, room DC2-750, 2 United Nations Plaza.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

The meeting was called to order at 10.20 a.m.

DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS (A/CN.9/362 and Add.1-18; A/CN.9/XXV/CRP.3 and 4)

1. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs), introducing the chapter summaries of the draft Legal Guide (A/CN.9/362/Add.17), said that the revised draft before the Commission was based on the comments of the Commission and of the Working Group on the earlier versions of the Guide. For greater clarity of presentation, the former chapter VII and the first section of former chapter III had been consolidated into chapter IV. Regrettably, it had not been possible, in the time available, to prepare the subject index requested by the Commission. The preparation of such an index, however, was a technical task which could be completed after the current session.

2. The secretariat suggested the insertion in chapter VI, section B, of the three paragraphs on investment contained in document A/CN.9/XXV/CRP.4. It would shortly make available to the Commission for its consideration the draft text of a resolution on the subject.

3. Mr. LEVY (Canada), supported by Mrs. FLINT (United Kingdom) and Ms. BUURE-HAGGLUND (Observer for Finland), proposed that the invaluable role played by the Chairman of the Working Group should be acknowledged in paragraph 2 of document A/CN.9/362 by the addition of the words "under the able leadership of Professor Bonell of Italy" after the word "Secretariat" in the last sentence.

4. It was so decided.

5. Mr. BONELL (Italy) said that, while countertrade was by no means the ideal form of international trade, the international community should be sensitive to the problems faced by many countries in their pursuit of countertrade transactions. The Commission's proposed Guide would assist such countries and the international business community in general in undertaking such transactions on a fair and equitable basis.

6. Ms. BUURE-HAGGLUND (Observer for Finland) said that her delegation was particularly satisfied that the draft Guide had dealt mainly with legal questions and had avoided commercial issues on which there was no agreement. The final text was instructive and not normative.

7. The CHAIRMAN invited the Commission to consider, chapter by chapter, the draft Legal Guide on International Countertrade Transactions as contained in document A/CN.9/362 and Add.1-18.

Chapter I (A/CN.9/362/Add.1)

8. Chapter I was approved.

Chapter II (A/CN.9/362/Add.2)

9. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) suggested the addition in paragraph 2 of the words "or investment" at the end of the penultimate sentence, and the words "and investment" at the end of the final sentence.

10. It was so decided.

11. Mr. OLSZOWKA (Poland), referring to section C of document A/CN.9/362/Add.2, said that although countertrade was not the most effective way of conducting international trade, it was still an important activity not only for developing countries, but also for some developed European countries, including Poland. In view of the importance of governmental regulations to the conduct of countertrade transactions, it would be very helpful if the secretariat could supplement its study with an annex containing the specific rules and barriers established by Governments in respect of countertrade transactions in particular countries or groups of countries.

12. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the United Nations Conference on Trade and Development (UNCTAD) had already done several studies on that subject.

13. Mr. OLSZOWKA (Poland) asked whether the secretariat could make the studies available to members of the Commission for their consideration.

14. Mr. LEVY (Canada) said that he would strongly object to any further work that would delay the publication of the Guide, which was urgently needed by countries and commercial interests throughout the world. Accurate information of the type sought by the representative of Poland was particularly difficult to come by, and would, in any case, be subject to frequent changes.

15. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that governmental regulations relating to countertrade were usually not contained in a discrete body of law, but were incorporated in various other regulations, which might not even make use of the word "countertrade". It would therefore be necessary to determine whether a particular governmental regulation dealt with countertrade. Moreover, it would be difficult to summarize governmental regulations on countertrade; most likely, it would be necessary to reproduce such legislation in full. Since the secretariat would have to rely on individual countries to submit all relevant regulations on countertrade, it would be difficult to ensure that a compilation of such legislation was complete and accurate.

16. In addition to the UNCTAD survey, several commercial organizations had published information on governmental regulations affecting countertrade.

17. Mr. OLSZOWKA (Poland) said that the secretariat should make the relevant documents on countertrade, in particular the UNCTAD survey, available to the members of the Commission, or at least provide a list of the symbols of those documents.

18. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the secretariat would endeavour to make such documents available to all interested delegations during the current session.

19. The CHAIRMAN said that, in paragraph 14, the word "barter" was translated into Spanish by "trueque"; however, the Spanish language also used the word "permuta" for "barter". That was only one example of the translation problems that would be encountered as the Commission made its final review of the draft Legal Guide. He suggested that, after the Commission had completed its consideration of the entire draft, efforts should be made to correct mistranslations and standardize terminology in all six languages.

20. Mr. EL-SHARKAWY (Egypt) said that there were serious mistakes in the Arabic translation which, if not corrected, would give rise to considerable misunderstandings in Arabic-speaking countries.

21. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the secretariat would be grateful if delegations informed it of any translation errors in the draft Legal Guide.

22. Mr. KOMAROV (Russian Federation) said that paragraph 16 should also refer to the use of credit in buy-back transactions.

23. Mr. CHATURVEDI (India) said that he did not understand why it was necessary to refer to "exporter" or "counter-importer" in paragraph 19 and to "importer" or "counter-exporter" in paragraph 20.

24. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that it was important to retain those references because the exporter and the counter-importer, and the importer and the counter-exporter, might sometimes designate different parties.

25. Chapter II, as amended, was approved.

Chapter III (A/CN.9/362/Add.3)

26. Mr. KOMAROV (Russian Federation) suggested that paragraph 4 should refer to the quality of goods as well as their quantity.

27. Chapter III was approved.

Chapter IV (A/CN.9/362/Add.4)

28. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said the secretariat suggested that the words "or the extent to which the components of the purchased goods were produced locally ('local content' or 'local value added')" should be added to the end of the first sentence of paragraph 33.

29. It was so decided.

30. Mr. BONELL (Italy) said that section F, which dealt with the stage when commitment was fulfilled, should logically precede section C, which dealt with the time period for fulfilment of countertrade commitment. That had been the original order of those two sections, and he saw no reason why that order should be changed.

31. The CHAIRMAN said he took it that the Commission agreed to restore the original order.

32. It was so decided.

33. Chapter IV, as amended, was approved.

The meeting was suspended at 11.35 a.m. and resumed at noon.

Chapter V (A/CN.9/362/Add.5)

34. Mr. BONELL (Italy), referring to the last sentence of paragraph 14, said he did not think it was wise to reopen the issue of whether a governmental agency, after entering into an arbitration agreement, could attempt to avoid carrying out the award made by the arbitral tribunal.

35. The CHAIRMAN noted that the sentence had been included in order to take account of a comment made by the United States representative.

36. Mr. LEVY (Canada) said it was his understanding that the sentence was intended to alert governmental agencies to the possibility that special authorization might be required, rather than to open the possibility that the carrying out of the award might be avoided.

37. The CHAIRMAN said that that was also his understanding.

38. Turning to paragraph 23, he suggested that the word "appropriate" in the third example should be translated into Spanish by "apropiado" rather than "competente".

39. Chapter V was approved.

Chapter VI (A/CN.9/362/Add.6)

40. The CHAIRMAN suggested that the text contained in document A/CN.9/XXV/CRP.4 should be added after paragraph 23 of document A/CN.9/362/Add.6.

41. It was so decided.

42. Ms. LOZANO FERRO (Observer for Colombia) suggested that, in view of the special situation obtaining in the Andean region, language should be added to paragraph 21 indicating that a purchaser of technology could not be compelled

(Ms. Lozano Ferro, Observer, Colombia)

to sell the goods produced by that technology to the seller of the technology and that a seller of technology could not be compelled to communicate any improvements in that technology to the purchaser.

43. The CHAIRMAN, replying to a request for clarification from Mr. LEVY (Canada), said it was his understanding that the agreement between the Andean countries prohibited technology transfers under contracts containing compulsory provisions covering the two points referred to by the Observer for Colombia.

44. Ms. LOZANO FERRO (Observer for Colombia) explained that rather than prohibiting transfers, the agreement provided that countries could refuse to accept the compulsory provisions.

45. Mr. BONELL (Italy) pointed out that the draft Legal Guide was intended to deal only with questions specific to countertrade transactions. If the Commission attempted to include all of the complex aspects of technology transfers, it would open up many problems.

46. Mr. LEVY (Canada) agreed with the Italian representative; it would be best not to touch on those issues in the Guide.

47. Chapter VI, as amended, was approved.

Chapter VII (A/CN.9/362/Add.7)

48. The CHAIRMAN referred to the term "joint venture" used in the English version of paragraph 37. The English term was widely understood in the field of international trade, whereas the renderings in the other languages were far less clear. He suggested that the English term should be used untranslated in all language versions, or alternatively that it should be added in parentheses, immediately after whatever translation was used. The same problem occurred in other paragraphs with reference to other specialized terms. He suggested that the secretariat might take his proposal into consideration and also pass it on to the translators.

49. Chapter VII was approved.

Chapter VIII (A/CN.9/362/Add.8)

50. Chapter VIII was approved.

Chapter IX (A/CN.9/362/Add.9)

51. The CHAIRMAN pointed out that the English words "trust" and "trustee" used in paragraph 10 had a specific legal meaning. The words used in some of the other language versions did not mean the same thing. He suggested that the words "trust" and "trustee" should be used in English in all the language versions.

52. Mr. BONELL (Italy) agreed. Paragraph 10 referred specifically to common-law systems, and it was appropriate to retain the words which were used in such systems, such as "trust".

53. The CHAIRMAN pointed out that paragraph 15 contained a list of different types of accounts, such as "escrow", "trust", and so on. He suggested that those English terms should be added in parentheses immediately after their translations.

54. Not all countries permitted the operation of blocked accounts as described in paragraph 23. An explanation to that effect might have been added.

55. Chapter IX was approved.

ELECTION OF OFFICERS (continued)

56. Mr. SCHNEIDER (Germany), speaking on behalf of the Group of Western European and other States, nominated Mr. Duchek (Austria) for the office of Rapporteur.

57. Mr. Duchek (Austria) was elected Rapporteur by acclamation.

58. Mr. FUJISHITA (Japan), speaking on behalf of the Group of Asian States, nominated Mr. Safarian Nemat-Abad (Islamic Republic of Iran) for the office of Vice-Chairman.

59. Mr. AZZIMANE (Morocco), speaking on behalf of the Group of African States, nominated Mr. El-Sharkawy (Egypt) for the office of Vice-Chairman.

60. Mr. KOMAROV (Russian Federation), speaking on behalf of the Group of Eastern European States, nominated Mr. Olszowka (Poland) for the office of Vice-Chairman.

61. Mr. El-Sharkawy (Egypt), Mr. Safarian Nemat-Abad (Islamic Republic of Iran) and Mr. Olszowka (Poland) were elected Vice-Chairmen by acclamation.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 478th MEETING

Held at Headquarters, New York,
on Monday, 11 May 1992, at 3 p.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

Draft legal guide on international countertrade transactions (continued)

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The meeting was called to order at 3.20 p.m.

DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS (continued) (A/CN.9/362 and Add.1-18; A/CN.9/XXV/CRP.3 and 4)

Chapter X (A/CN.9/362/Add.10)

1. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the words "or 'Europe'" in paragraph 12 had replaced the phrase "or 'Eastern Europe'", which had seemed entirely too general.

2. Mr. BONELL (Italy) said that his delegation thought that the wording of the last sentence of paragraph 25 could be improved. It might not be appropriate to say that "the parties would be obligated to review the affected restriction", since, to his knowledge, no legal system obliged parties to review such restrictions in cases of hardship or major change in circumstances.

3. The CHAIRMAN said that note would be taken of that point in the final drafting.

4. Chapter X, as amended, was approved.

Chapter XI (A/CN.9/362/Add.11)

5. The CHAIRMAN noted that in some countries the amount stipulated in a penalty clause could not exceed the principal amount. Likewise, in some countries, if a penalty clause was inserted in a contract, no claim for damages could subsequently be made. He suggested that wording which reflected those situations should be added to paragraph 7, after the third sentence.

6. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) suggested that the Secretariat should be given the choice of inserting wording to that effect in paragraph 7 or in paragraph 12.

7. It was so decided.

8. Mr. AZZIMANE (Morocco) noted that while paragraph 1 dealt with liquidated damages clauses and penalty clauses, paragraph 2 was introductory in nature. He therefore proposed that the order of the two paragraphs should be inverted. He also sought clarification as to the distinction being made between liquidated damages clauses and penalty clauses.

9. The CHAIRMAN said that the title of the chapter reflected the common-law distinction between liquidated damages and penalty clauses. Perhaps the Drafting Group might wish to use the lexicon published by the International Chamber of Commerce, which contained accepted equivalents for more than 2,000 legal terms.

10. Mr. LEVY (Canada) explained that the distinction between the two terms, in theory if not always in practice, was that liquidated damages involved a genuine pre-assessment by both parties of the financial effect of incomplete performance of the contract, while a penalty clause involved a more arbitrary fine or penalty for failure to perform.

11. Mr. BONELL (Italy) questioned the advisability of using the lexicon to which the Chairman had referred, since the translations it contained sometimes applied only to common law or to civil law. The use of both "liquidated damages" and "penalty clauses" had in fact been decided on so that the reader would not get the false impression that the text applied to only one legal system.

12. Mr. DUCHEK (Austria) recalled that in the early 1980s UNCITRAL had adopted Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, which might be helpful in drafting the current provisions.

13. Mr. CHATURVEDI (India) suggested that it might be appropriate for the terms in question to be defined at the beginning of the chapter.

14. The CHAIRMAN said that as the two concepts were not directly related to countertrade, providing explicit definitions would accord them undue importance and was in any case unnecessary, since the terms were defined in context.

15. Mr. LEVY (Canada) suggested that the concern of the representative of Morocco might be met by revising the title of chapter XI to include wording previously used by UNCITRAL, i.e. "Agreed sum due upon failure of performance".

16. Mr. EL-SHARKAWY (Egypt) said that, usually, liquidated damages were assessed if fault could be proved on the part of the debtor, while penalty clauses applied irrespective of fault. In Egyptian law, however, fault had to be proved in both cases. Because of the distinction established in some legal systems between failure to perform an obligation and default, he suggested that the words "a default" should be added after the phrase "a failure by a party to perform a specified obligation" in paragraph 1.

17. Mr. BONELL (Italy) welcomed the suggestion made by the representative of Egypt, but said that if the Commission decided to address the whole matter of liquidated damages and penalty clauses the process might be very lengthy, given that it had already taken a very long time to reach consensus on the preliminary draft. The precise nature and effect of such clauses would in any case vary from one State to another, and the provisions were not peculiar to countertrade. The text did not lend itself to more general considerations.

18. Mr. KOMAROV (Russian Federation) said that, with regard to paragraph 6, it would be useful to add a provision to the effect that damages could be paid in the form of deliveries of goods rather than money.

19. Mr. BONELL (Italy) said that further consideration would have to be given to the merits of such a rule. It might not be wise to accord a party the unilateral right to offer commodities in lieu of the monetary amount agreed upon in the liquidated damages or penalty clause.

20. Mr. KOMAROV (Russian Federation) suggested that his proposal could be included in a milder form. If the text was left unchanged, end-users of the guide could experience delays in situations in which there was not enough money to fulfil an obligation.

21. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that there were two possibilities: the agreed amount of liquidated damages could be expressed in goods rather than in money, a step that would require research to determine what was allowable under different legal systems; or the agreed amount could be expressed in money and the payment clause could provide for the possibility of the debtor delivering goods instead of paying money.

22. Mr. KOMAROV (Russian Federation) said that he preferred the second option; the parties would know ahead of time that damages could be paid in the form of the supply of goods of equivalent value. The liquidated damages or penalty clause would be expressed in money, but the parties could agree in the contract that equivalent payment in commodities or other goods was acceptable.

23. Mr. LEVY (Canada) said that that suggestion could give rise to many problems. The aggrieved party might not want to receive goods instead of money. Furthermore, if such a provision was included in the guide, even in the form of a suggestion, users might assume that it was meant to be a standard provision, which would be desirable; the purpose of paragraph 6 was to provide compensation for the aggrieved party in transferable currency. If the amendment was introduced, the Commission would be creating a form of countertrade which had not even been contemplated in the original agreement.

24. Mr. CHATURVEDI (India) said he supported the proposal made by the representative of the Russian Federation. It was very common for developing countries to experience foreign-exchange difficulties. It would thus be useful to indicate that even if the parties had agreed that damages would be paid in foreign exchange, they could, if the situation changed, consider repayment in the form of commodities.

25. Ms. BUURE-HAGGLUND (Observer for Finland) said that she was opposed to the inclusion of the new provision. Obviously, parties could always substitute goods for cash, but that would be a very unusual manner of dealing with liquidated damages. The proposed provision could create confusion.

26. Mr. BONELL (Italy) said he disagreed that the provision would meet a common need of developing countries. In his experience, penalty clauses were typically invoked by an exporter who, after having sold goods, often to a developing country, was no longer willing to accept a counterimport. Thus the

(Mr. Bonell, Italy)

proposed provision would be in the interests of the exporter rather than of developing countries.

27. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that a large number of contracts containing penalty clauses had been reviewed, and they provided almost exclusively for payment by the party from the developed country, typically in the form of a commitment to buy goods in the future. If the Commission wished to add such a provision, it could indicate that, if difficulties arose when payment of liquidated damages fell due, the parties might consider replacing the obligation to pay by an obligation to perform a service or deliver goods.

28. Mr. ARONOFF (United States of America), referring to section D of chapter XI, said that it would be logical to move paragraph 21 so that it followed paragraphs 22 and 23.

The meeting was suspended at 4.30 p.m and resumed at 5.05 p.m.

Chapter XII (A/CN.9/362/Add 12)

29. Mr. EL-SHARKAWY (Egypt), referring to paragraph 9, asked whether his understanding of the last sentence was correct, namely, that the obligated party did not have the option of not fulfilling the underlying obligation and asking the guarantor to pay the guarantee.

30. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said it was the party who suffered loss as a result of a failure to fulfil a contractual obligation who had the option of claiming payment under the guarantee; accordingly, the obligated party could not release himself from his obligation by having the guarantee amount paid.

31. Mr. LEVY (Canada) said he understood the purpose of the sentence, but questioned whether it was necessary. It was difficult to understand how an obligated party who had obtained a guarantee from a bank or from another financial institution would have a choice. The guarantee came into effect only if the obligated party was prevented from fulfilling his obligations; if he could fulfil them, he must do so.

32. Mr. BONELL (Italy) said that he was not entirely in agreement with the Canadian representative. The purpose of the sentence was not to refer to the relationship between the guarantor and the guaranteed party, but to serve as a reminder that if a party did not fulfil its obligation towards the other party, thereby provoking a call of the bond by the obligee, that party was not really making a choice. The obligor would still be required to pay the amount charged by the bank, which would be less convenient than fulfilling the original obligation. In strict economic terms, it was always better to fulfil an obligation; however, where a party, because of other considerations, preferred to pay the penalty for non-fulfilment, it should be entitled to do so.

33. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that a situation could be envisaged in which the liquidity damages covered by the guarantee would be relatively low, so that as a result of subsequent price developments, a party might find it more advantageous to have the guarantee called than to purchase the goods which were the subject of the contract. The sentence was intended to make it clear that the party would not have that option. Of course, in the situation which he had described, specific performance was rarely possible; it was more of a theoretical possibility.

34. Mr. LEVY (Canada) said that the sentence was not unclear, but superfluous. In the case of a building contract, for example, where performance was guaranteed by a financial institution and the contractor defaulted, the financial institution would, if possible, take over the contract and ensure that it was fulfilled. Where there was a guarantee, the guarantor would insist on performance so as to avoid having to pay.

35. Chapter XII was approved.

Chapter XIII (A/CN.9/362/Add.13)

36. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that in paragraph 1, some editorial changes had been made after the document had been issued: the words in brackets "(sections B and C)" should read "(section B)", "(section D)" should read "(section C)", and "(section E)" should read "(section D)".

37. Mr. ARONOFF (United States of America), referring to paragraph 11, said that he had difficulty with the term "pre-contractual liability". The question of pre-contractual liability might arise in the case of supply contracts; however, in the case of the countertrade commitment itself, contractual liability was involved. The purpose of the paragraph might be to indicate that if monetary damages could not be assessed, there was no enforceable contract.

38. Mr. BONELL (Italy) agreed that where a breach of a contractual obligation occurred, contractual liability could be invoked. In some cases, however, pre-contractual liability was involved: for example, where a countertrade commitment foresaw only a commitment in principle, as shown by the use of such terms as "best efforts" and "negotiating in good faith". In that case, if a party did not use his best efforts, the type of liability involved would be pre-contractual liability, since no contract had been concluded. Accordingly, he suggested that the sentence should be amended to read "The problem of liability for failure to fulfil a countertrade commitment may also raise the question of pre-contractual liability".

39. Mr. ARONOFF (United States of America) agreed to the proposed amendment.

40. Mr. LEVY (Canada) said that, for the purposes of further clarification, the following phrase should be added after the words "pre-contractual liability": "while in other jurisdictions, an agreement to agree is not enforceable in law."

41. The CHAIRMAN said that, if he heard no objection, he would take it the Commission wished the secretariat to take note of the proposed amendments.

42. It was so decided.

43. Mr. BONELL (Italy), referring to paragraph 9, said that the third sentence was unnecessary and should be deleted.

44. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) drew attention to the first sentence of the paragraph, which stated that the termination of a contract might be subject to certain conditions. He recalled that the Commission had discussed whether the United Nations Convention on Contracts for the International Sale of Goods was applicable to a countertrade agreement, since it might be argued that a countertrade agreement was not a definite sales contract, but merely preceded a definite contract. The same considerations could apply to the rules governing the termination of definite contracts.

45. Ms. BUURE-HAGGLUND (Observer for Finland) said that she understood the doubts expressed by the representative of Italy. The sentence as it stood was unclear and should be deleted.

46. The CHAIRMAN suggested that, in order to remove any doubts, the sentence should be deleted.

47. It was so decided.

48. Chapter XIII, as amended, was approved.

Chapter XIV (A/CN.9/362/Add.14)

49. Ms. BUURE-HAGGLUND (Observer for Finland) said that the beginning of paragraph 2 should be amended to read "in most national laws, the parties are permitted", since it would be exceptional for a choice-of-law clause not to be accepted. In the second sentence of paragraph 5, it would be preferable to replace the words "may govern the transfer of ownership" by the words "usually governs the transfer of ownership", since it would be highly unusual if the law in question did not apply.

50. Mr. EL-SHARKAWY (Egypt) said that the word "may" was more appropriate, since it was not true that the law applied in all cases.

51. Mr. LEVY (Canada) said that he supported the amendment to paragraph 5 proposed by the observer for Finland, since the word "may" was not strong enough.

52. Mr. BURMAN (United States of America) said that the words "the bank holding funds" in paragraph 5 should be replaced by the words "the bank issuing a guarantee or counter-guarantee", since the bank holding the funds might be a different one. In addition, the words "may govern disposition of the funds" should read "usually governs disposition of the funds", since the law in question was a general rule which applied in many legal systems.

53. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that the text did not refer to the functions of the bank as a guarantor but as the holder of an account.

54. Mr. DUCHEK (Austria) agreed with the Finnish proposals concerning paragraphs 2 and 5. It was true that the autonomy of the parties had become widely accepted and that the principle was incorporated in most national laws. In paragraph 5, however, the important point was not to say that in many legal systems the lex situs applied to the law of ownership, but rather that there was no possibility for the parties to deviate from that law. He felt that the drafting could be improved in order to reflect that concern.

55. Mr. LEVY (Canada) said that it would be possible to combine the proposals made by the representatives of Finland and Austria by amending the text to read: "For example, regardless of the choice by the parties, the law of the State where goods are situated will usually govern the transfer of ownership of those goods; the parties cannot opt out of such laws".

56. Mr. EL-SHARKAWY (Egypt) said that in some cases the transfer of ownership was governed by the law of the State where the contract of sale was executed. It would therefore be more appropriate to retain the word "may".

57. Mr. BONELL (Italy) agreed with the representative of Egypt that the text should remain as it stood. He understood the concerns expressed by the representative of Austria but was reluctant to adopt a hard and fast rule saying that the parties could not opt out. It was necessary to reflect the fact that different approaches were followed in different States.

58. Ms. BUURE-HAGGLUND (Observer for Finland) said it was apparent from the discussion that the text as it stood was not clear. She was willing to accept the solution proposed by the representatives of Austria and Canada and to entrust the exact wording to the secretariat.

59. Mr. CHATURVEDI (India) said he was in favour of retaining paragraph 5 in its existing form.

60. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said it was possible that some States took a more liberal approach to the question of the disposition of funds than they did to the transfer of ownership and that they allowed the parties a greater freedom of choice.

61. Mr. LEVY (Canada) said that he could not accept the paragraph as it stood. He was not aware that any States took a more liberal approach to the question of disposition of funds. In most States, laws on the disposition of funds held in a bank were just as stringent as other aspects of the law governing transfer of property. It would be very unusual for a State to allow the laws of another State to be applied to its banking system. He therefore felt that the use of the words "most States" was justified in both cases.

62. The CHAIRMAN suggested that the representatives of Canada, Austria and Egypt and the observer for Finland should meet with the secretariat to produce an acceptable text.

The meeting rose at 6.15 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fifth session

SUMMARY RECORD OF THE 479th MEETING

Held at Headquarters, New York,
on Tuesday, 12 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

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Draft legal guide on international countertrade transactions (continued)

This record is subject to correction.

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The meeting was called to order at 10.10 a.m.

DRAFT LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS (continued) (A/CN.9/362 and Add.1-18; A/CN.9/XXV/CRP.3 and 4)

Chapter XIV (continued) (A/CN.9/362/Add.14)

1. The CHAIRMAN recalled that there had been a difference of opinion on the preceding day with regard to paragraph 5, referring to the selection of the applicable law. The representatives of Canada and Egypt and the observer for Finland had undertaken to try to draft a generally acceptable text.

2. Ms. BUURE-HAGGLUND (Observer for Finland) read out the new wording of the second sentence of paragraph 5: "For example, most States do not allow the freedom of choice with respect to the questions of the transfer of ownership of goods or the disposition of funds held in a bank."

3. The amendment was approved.

4. Mr. BONELL (Italy) said that with the new wording, the Commission had changed the emphasis of paragraph 5 to reflect more closely the actual state of affairs. He felt that a similar change should be made in the first sentence of paragraph 2, where "many national laws" should become "most national laws".

5. Ms. BUURE-HAGGLUND (Observer for Finland) said that she understood the Commission had already decided to amend paragraph 2 as the representative of Italy had just proposed, but she wished to propose a more extensive change. The intricacies of private international law were not well understood, even by many lawyers. In the interests of making paragraph 2 clearer, she suggested the following wording:

> "Under the rules of private international law (in some legal systems referred to as 'conflict of laws' or 'choice of law' rules) of most jurisdictions the parties are permitted by agreement to choose the applicable law. Under some laws there are, however, certain restrictions on that choice. If the parties do not choose the applicable law, the private international law rules of the forum will determine which law governs the legal relationship."

6. The amendment was approved.

7. Mr. DUCHEK (Austria) said that he had a comment on the second sentence of paragraph 15, dealing with situations in which parties agreed that their transaction would be governed not by a national law, but by some other set of rules. Under that paragraph, in those States which did not permit such an option, the national law would apply, with the other rules applying in so far as they did not contravene the mandatory provisions of the applicable national law. However, that was not necessarily the case. There were two

(Mr. Duchek, Austria)

possibilities: while some States might forbid the option entirely, others might permit the application of those portions of the selected other set of rules which were not in conflict with the mandatory rules of the national law. He suggested that the second sentence should be amended to make it clear that either of those possibilities might exist.

8. Mr. AZZIMANE (Morocco) pointed out that paragraph 9 said that an express choice of the applicable law was advisable, and paragraph 10 described the possible consequences if that express choice were not made. Therefore, the phrase "unless the parties have chosen the applicable law" in the sixth sentence of paragraph 10 was redundant, because the whole paragraph relied on the hypothesis that that choice had not been made.

9. Mr. BONELL (Italy) said that the wording of the penultimate sentence of paragraph 10 was misleading. It seemed to imply that, given two possible decisions as to the applicable law, an arbitral tribunal was just as likely to make one decision as the other. The sentence should be reworded to give more emphasis to the first choice, which was the one envisaged in the UNCITRAL Model Law on International Commercial Arbitration, while the second was provided for, as far as he was aware, only in the legislation of France.

10. Mr. LEVY (Canada) recalled that the Commission was not drafting a text on arbitration or conflict of laws, but on countertrade. The discussion was penetrating too deep into other complex issues, which could be avoided simply by deleting part of paragraph 2.

11. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) suggested that the last sentence of paragraph 10 should be retained, since its intention was to bring to light the difficulties which might arise if an express choice of applicable law were not made.

12. Ms. BUURE-HAGGLUND (Observer for Finland) recalled that the Commission had taken a decision not to deal with general questions not specifically applicable to countertrade. She therefore supported deletion of the penultimate sentence of paragraph 10 and retention of the last one.

13. Mr. BONELL (Italy) said that he also supported deletion of the penultimate sentence of paragraph 10 and retention of the last one.

14. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the choice-of-law clause described in paragraph 16 virtually never applied in matters of contract law, although it might in other branches of law. He suggested that the opening words of the paragraph "In many national laws" should be changed to "In most national laws".

15. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) referred to the fourth sentence of paragraph 12, and suggested that "under other systems" should be amended to "under most systems".

16. Chapter XIV, as amended, was approved.

Chapter XV (A/CN.9/362/Add.15)

17. Mr. AZZIMANE (Morocco) said that the description, in paragraph 2, of the arbitrators as "impartial" implied that other types of legal proceedings were less impartial. He proposed that the word "impartial" should be deleted.

18. The proposal was approved.

19. Mr. AZZIMANE (Morocco) proposed that "in general" should be deleted from the first sentence of paragraph 18.

20. The proposal was approved.

21. Mr. GRIFFITH (Observer for Australia) said he regretted that the Commission had not made a stronger case in the draft Legal Guide in favour of the UNCITRAL Arbitration Rules, which could provide useful guidance on many arbitration-related issues. Consideration might be given to the inclusion in the text of a general paragraph recommending the Rules.

22. The CHAIRMAN suggested that the secretariat should be requested to redraft paragraph 29 in order to place greater emphasis on the Rules.

23. It was so decided.

24. Mr. LEVY (Canada) said that an arbitral tribunal did not have the power to enforce a remedy of specific performance. The word "grant" in the antepenultimate sentence of paragraph 16 should therefore be replaced by a more muted term, such as "award".

25. It was so decided.

26. Mr. LEVY (Canada) suggested the addition of the words "as such" after the word "enforceable" in the second sentence of paragraph 21, since an arbitral award was in fact enforceable if an action was brought for its enforcement as a contract.

27. It was so decided.

28. Mr. LEVY (Canada), referring to paragraphs 36 and 37, said that the Guide should place greater emphasis on the work of the United Nations, in general, and of UNCITRAL, in particular. It should also mention as desirable places of arbitration those countries which had ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Lastly, it should indicate that States which had enacted the UNCITRAL Model Law on International Commercial Arbitration did not require reciprocity, since the relevant provisions of the Model Law did not provide for the option of reciprocity permitted by the reservations clause in the 1958 Convention.

29. Mr. BONELL (Italy) said while he hoped that the Model Law would indeed find broad international acceptance, he would not go as far as to recommend as places of arbitration those States which had ratified it.

30. The CHAIRMAN recalled that the Working Group had been guided by the principle that it should not make provisions on questions outside the scope of countertrade. The last proposal of the representative of Canada could not therefore be accepted.

31. Mr. EL-SHARKAWY (Egypt) said that the Guide should provide for situations in which the parties included in their contract a clause on international arbitration, while, at the same time, the legislation of the State of one of the parties granted exclusive competence to the national jurisdiction. He suggested the inclusion of a new paragraph that would recommend that parties to countertrade contracts should be bound by arbitral agreements regardless of provisions in national law concerning jurisdiction.

32. The CHAIRMAN said that the Guide would only facilitate the preparation of contracts in which the parties themselves stipulated their rights and obligations. It could not of itself create rights and obligations.

33. Mr. EL-SHARKAWY (Egypt) said that the point of his suggestion was to ensure respect for the intention of the parties. The reference to national law might even be deleted.

34. Mr. BONELL (Italy) said that the Guide should alert parties to the possible existence of mandatory national rules, which would prevent them from selecting their own place of arbitration.

35. Chapter XV, as amended, was approved.

Chapter XVI (A/CN.9/362/Add.16)

36. Mr. BONELL (Italy), referring to paragraph (1) of the footnote to paragraph 21 of chapter XIII (A/CN.9/362/Add.16, p. 7), said that the words "physical or legal" did not appear in article 79 of the United Nations Sales Convention and should therefore be deleted.

37. It was so decided.

38. Chapter XVI, as amended, was approved.

Chapter summaries (A/CN.9/362/Add.17)

39. Ms. BUURE-HAGGLUND (Observer for Finland) said that the secretariat should ensure that the chapter summaries conformed to the wording of the decisions taken by the Commission on the draft Legal Guide.

40. The chapter summaries were approved.

Draft resolution on the draft Legal Guide (A/CN.9/XXV/CRP.3)

41. Mr. PFUND (United States of America) drew attention to the need to ensure that adequate publicity was given to the publication of the Guide.

42. Mr. LEVY (Canada) said that the Guide would be a useful document and should be published as soon as possible in a readable format. It was also important, as the United States representative had said, that it should be publicized adequately.

43. Mr. HERRMANN (Secretary of the Commission) assured the Commission that the Secretariat was aware of the need to publicize the Guide effectively; it would do its best to persuade the competent section of the Secretariat to make greater efforts to that end. He pointed out that delegations and Governments could also help to ensure greater awareness of the Guide on the part of its potential users.

44. Mrs. AUGIER (France) suggested that the word "involved" in the third preambular paragraph of the draft resolution should be translated in the French text as "qui effectuent".

45. Mr. MBURI (United Republic of Tanzania) said that the phrase "while being conscious that countertrade may have certain disadvantages" in the second preambular paragraph had a negative connotation and should be deleted.

46. Mr. BONELL (Italy) supported that suggestion. There was no need for the Commission to enter into the merits or demerits of the transactions in question.

47. Mr. PFUND (United States of America), Mr. HUNJA (Kenya), Ms. BUURE-HAGGLUND (Observer for Finland) and Mr. GRIFFITH (Observer for Australia) supported the suggestion.

48. Mr. CHATURVEDI (India) said that he also supported the Tanzanian suggestion. At the same time, he was grateful to the Secretariat for the timely completion of the draft Legal Guide, which was of great importance for the developing countries and represented an important contribution to the work of the Commission.

49. The Tanzanian suggestion was adopted.

50. Mr. ALVAREZ (Uruguay) suggested that, in paragraph 2 of the draft resolution, the word "persons" should be replaced by less colloquial wording, such as "all entities and individuals".

51. Mr. CHATURVEDI (India) said that he preferred the retention of the word "persons", at least in the English text.

52. The CHAIRMAN suggested that the entire phrase "to persons involved" should be deleted.

53. It was so decided.

54. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) pointed out that the Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works had included a sentence asking the public to communicate any comments or suggestions concerning that Guide to the Secretariat. A similar sentence might be added to the Guide on International Countertrade Transactions.

55. Mr. LEVY (Canada) asked whether the Secretariat had in fact received any comments from the public concerning the Guide on construction contracts.

56. Mr. SEKOLEC (International Trade Law Branch, Office of Legal Affairs) said that some comments had been made in publications.

57. The CHAIRMAN said he took it that the Commission agreed to add a sentence along the lines suggested by the representative of the International Trade Law Branch.

58. It was so decided.

59. The draft resolution, as amended, was adopted.

The meeting rose at 1.05 p.m.